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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JUAN MARCOS ALMARAZ et al.,

Plaintiffs and Appellants,

v.

SHARP HEALTHCARE et al.,

Defendants and Respondents.

D055739

(Super. Ct. No. 37-2007-00069288-
CU-MC-CTL)

APPEAL from an order of the Superior Court of San Diego County, Ronald S.

Prager, Judge. Reversed and remanded with instructions.

This appeal is from an order denying a motion for class certification in a proposed class action lawsuit for alleged violations of state wage and hour laws against Sharp HealthCare, Grossmont Hospital Corporation, Sharp Chula Vista Medical Center, Sharp Memorial Hospital and Sharp Coronado Hospital and Healthcare Center (collectively "Sharp") brought by Juan Marcos Almaraz, Susan K. Bowers, Ruth Donley, Carolyn M. Hitchin, Beth Hurley, Kurt Kalker, Lois K. Klepin and Maureen C. Schickler (Plaintiffs)

on behalf of Sharp's registered nurses (RN's). Plaintiffs contend that the trial court abused its discretion in determining that class certification was inappropriate and in making certain evidentiary rulings.

As we will explain, we conclude that the trial court abused its discretion by failing to consider two theories of liability alleged by Plaintiffs and by making certain evidentiary rulings. Accordingly, we reverse the order denying class certification and remand with instructions for the trial court to reconsider the motion, (1) taking into account Plaintiffs' two additional theories of liability to determine whether class treatment is appropriate for this action; and (2) considering the evidence that it improperly excluded.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Complaint*

Plaintiffs are RN's who work or worked at health care facilities operated by Sharp. In June 2007, Plaintiffs filed a class action complaint on behalf of a proposed class defined as "[a]ll non-exempt [RN's] currently or formerly employed by Sharp HealthCare in the County of San Diego at one of its affiliated health care institutions on or after June 28, 2003." The complaint contained four causes of action, and under the heading "Allegations Common to All Causes of Action," it alleged the following:

"34. At all times mentioned herein, Defendants have failed to adequately staff their health care institutions with [RN's] with the result that [RN's] have . . . been forced to work before and after their scheduled shifts without additional compensation.

"35. At all times mentioned herein, Defendants have failed to adequately staff their healthcare institutions with [RN's,] with the result that [RN's] have not been adequately provided with relief [RN's]. As a result of the foregoing practices . . . [RN's] routinely have been unable to take half-hour, unpaid meal periods totally relieved of all duties and paid, 10-minute rest periods totally relieved of all duties.

"36. At all times mentioned herein, Defendants have coerced [RN's] into not reporting all hours they are suffered or permitted to work and the deprivation of their meal periods and rest periods by, among other things, disciplining the [RN's] who reported overtime and working through their meal and rest periods."

The first cause of action alleged that Sharp had failed to pay wages for all time worked in violation of Labor Code sections 204 and 1194.¹ Specifically, the complaint alleged that (1) RN's were not paid for time worked before or after scheduled shifts; and (2) that although RN's worked through meal periods, half-hour meal periods were deducted from their wages. Contained in the first cause of action was also the general allegation that "Defendants have knowingly permitted" RN's "to work without paying for all time worked, either at their agreed-upon regular rates or applicable minimum wage or overtime rates."

The second cause of action alleged that Sharp failed to provide RN's with 30-minute meal periods relieved of all duties, in violation of Labor Code section 226.7 and

¹ Labor Code section 204 provides rules for the scheduling of the payment of wages, including wages earned for labor in excess of the normal work period.

Labor Code section 1194, subdivision (a) provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

section 11 of Industrial Welfare Commission Wage Order No. 5-2001 (see Cal. Code Regs., tit. 8, § 11050, subd. 11).²

The third cause of action alleged that Sharp failed to provide RN's with 10-minute rest periods relieved of all duties in violation of Labor Code section 226.7 and section 12

² Labor Code section 226.7 provides: "(a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission. [¶] (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided."

"The Industrial Welfare Commission . . . is the state agency empowered to formulate wage orders governing employment in California." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1102, fn. 4.) With respect to meal periods, the applicable wage order provides in relevant part: "(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked. An 'on duty' meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time. [¶] (B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided." (Cal. Code Regs., tit. 8, § 11050, subd. 11(A)-(B).) Specifically with respect to health care workers, the wage order provides: "(D) Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of their two meal periods. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one (1) day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect." (Cal. Code Regs., tit. 8, § 11050, subd. 11(D).)

of Industrial Welfare Commission Wage Order No. 5-2001 (Cal. Code Regs., tit. 8, § 11050, subd. 12).³

The fourth cause of action alleged a violation of the unfair competition law (Bus. & Prof. Code, §§ 17200-17209) premised on Sharp's alleged violations of the state wage and hour laws.

Sharp filed an answer, and the Plaintiffs proceeded to conduct discovery.

B. *Plaintiffs' Class Certification Motion*

In April 2009, Plaintiffs filed the motion for class certification that is at issue in this appeal. Plaintiffs argued that class certification was warranted because they had established all of the requirements for class certification, including "'predominant common questions of law or fact.'" (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089 (*Fireside*).)

In their motion for class certification, Plaintiffs described several theories of liability. According to Plaintiffs' memorandum of points and authorities, "[t]he main

³ With respect to rest periods, the applicable wage order provides in relevant part: "(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted, as hours worked, for which there shall be no deduction from wages. [¶] (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided." (Cal. Code Regs., tit. 8, § 11050, subd. 12(A)-(B).)

thrust of Plaintiffs' allegations is [(1)] that Sharp does not truly provide [RN's] with timely and uninterrupted rest and meal periods totally relieved of all duties, [(2)] that nurses are not paid for the work performed during their meal periods or for significant amounts of pre- and post-shift work, and [(3)] that the meal waiver 'agreements' uniformly used by Sharp are neither voluntary nor consistent with the plain language of the governing statute."⁴ Although not set forth as the "main thrust" of Plaintiffs' case, the memorandum of points and authorities also described another alleged violation of the wage and hour laws. Plaintiffs claimed that "[s]ince 2003, seven of the eight named Plaintiffs at several different hospitals and all in different units have repeatedly been denied daily and weekly overtime on those occasions when their time was reported as one or more of the codes making up the 'master' code 'EDUC . . . ,' " which is used to indicate time spent in training, orientation or education.⁵

⁴ Plaintiffs elaborated on this allegation in their memorandum of points and authorities: "Since at least April 6, 2005 . . . , Sharp has used a systemwide meal waiver form that purports to permit nurses assigned to work more than eight hours per day (usually a 12-hour shift) to waive their first meal period [¶] . . . [N]urses, who are essentially given a waiver form and forced to sign it, are routinely scheduled to take their meal periods . . . long after working five hours or more." Plaintiffs further explained their contention that existing law should not be interpreted to permit healthcare workers on shifts over eight hours to waive their *first* meal period, but instead to permit the waiver of only the *second* meal period.

⁵ Related to this allegation, a declaration from Plaintiffs' attorney explained that he had caused a spreadsheet to be prepared and attached to his declaration, "showing how Defendants' systemwide Payroll Department incorrectly denied or miscalculated overtime compensation, often more than 50 percent of the time, in instances when the systemwide payroll code EDUC was applied to training, education, orientation or meetings recorded on the [*sic*] seven of the eight Plaintiffs' time cards."

Applying these theories of liability to the issue of whether common questions of law and fact predominate as required for class certification, Plaintiffs stated that "the overriding common question of fact as to the class is whether, in spite any 'policies' to the contrary, Sharp's actual practice is to deny [RN's] the meal and rest periods totally relieved of all duties to which they are entitled." Further, they stated that "there are several overriding common issues of law . . . , including: . . . (2) whether Sharp's staffing policies unlawfully interfere with its [RN's] ability to take duty-free meal and rest periods[;] (3) whether Sharp was required to provide the putative class with meal periods by the end of their fifth hour of work; and (4) whether [RN's] have effectively waived any meal period."

In support of the motion, Plaintiffs filed approximately 1,200 pages of evidence, including: a declaration from counsel; a report from one expert, David Lewin;⁶ a

⁶ Lewin — offered as a expert on human resources management — stated that he was asked to "render opinions regarding the adequacy of Sharp Healthcare's . . . meal period and rest break policies for hourly [RN's] employed by Sharp Healthcare generally, and in particular the scheduling and staffing of [RN's] performing work in Unit 2 East at Sharp Grossmont Hospital." Lewin concluded: (1) "Sharp's expressed meal period and rest break policies are confusing, inconsistent, often contradictory, and therefore deficient"; (2) "Sharp's implementation of its meal period and rest break policies — that is, its practices — differ in several substantial respects from those stated policies"; (3) "Sharp's meal period and rest break practices and nurse's meal and rest break behavior are substantially influenced by Sharp's nurse-to-patient staffing ratios. The lean staffing in relation to Sharp's targeted staffing ratios, together with nurses' dynamic working environment, and Sharp's highly decentralized approach to the management of meal periods and rest breaks, compromises the nurses' ability to take meal periods and rest breaks."

Lewin acknowledged that he used data from only one of Sharp's units, and from a limited time frame, in analyzing Sharp's implementation of its meal period and rest break policies. However, he stated that it was "possible to specify a research design from

declaration from another expert, Richard Drogin;⁷ declarations from four of the named Plaintiffs; excerpts from 13 depositions, employee handbooks and orientation materials; and certain time cards from six of the named Plaintiffs. Plaintiffs also filed a 31-page document titled "Evidence in Support of Plaintiffs' Motion for Class Certification," which was similar to a separate statement of undisputed facts filed in connection with a motion for summary judgment (Code. Civ. Proc., § 437c, subd. (b)(1)) and which summarized what Plaintiffs described as "the key facts in support of class certification," and provided citations to the evidence.⁸

With respect to Plaintiffs' theory that Sharp did not provide RN's with the required rest and meal periods, the evidence showed that Sharp's *stated* policy was to provide meal

analyzing Sharp's meal period and rest break policies, practices and staffing ratios for nurses that incorporates a random sampling method which, if implemented, would enable drawing broader, deeper, generalized conclusions and opinions about these matters." Other than a vague reference to "Sharp's meal period and rest break policies, practices and staffing ratios," Lewin did not specify what type of generalized conclusions would be possible from the proposed random sampling method.

⁷ Drogin, a statistician, stated that he was "asked to provide [an] opinion on sampling issues, and methods for gathering evidence in similar wage and hour cases." He opined that "random sampling methods would be an appropriate statistical technique for estimating the percentage of rest and meal breaks earned by employees, where employees were not totally relieved of duties, and the consequent aggregate classwide damage amount." Drogin's three-and-a-half-page declaration was purely generic and provided no discussion or analysis specific to Plaintiffs' case. Instead, Drogin *very* generally described that in "numerous other cases," he had used methodologies that included selecting a random sample of class members and taking their depositions, and that such a method might be employed in this case.

⁸ Over Sharp's objection, the trial court permitted the filing of the "Evidence in Support of Plaintiffs' Motion for Class Certification," and ordered that Sharp should file a similar document in connection with its opposition papers.

and rest breaks in compliance with the applicable laws, and to pay employees for one hour of extra work — as required by law — if an employee missed a meal or rest period. Indeed, the timecards and employee handbooks submitted by Plaintiffs showed that employees were informed about the legally required rest and meal periods, and were instructed how to fill out their timecard with the notation "NB" (presumably standing for "no break") to indicate that they were not able to take one or more of their required breaks or their meal, and thus were entitled to the extra hour of pay provided by law. Plaintiffs alleged that Sharp nevertheless "developed their 'facially lawful' policy specifically to provide it with plausible deniability and not to actually provide nurses with rest and meal periods."

Plaintiffs' class certification motion was unfocused, and thus did not clearly and logically set forth the basis for Plaintiffs' claim that — despite Sharp's stated policies — RN's did not in fact receive required rest and meal periods or the appropriate compensation in lieu of those meal and break periods. In opposing the class certification, Sharp correctly observed that Plaintiffs' allegations were difficult to understand, but it attempted to summarize those allegations as follows:

"Sharp admits finding it difficult to ascertain from Plaintiffs['] [memorandum of points and authorities] the basis for Plaintiffs' contention that the meal/rest period and off the clock claims of all [RN's] can be resolved through common proof. . . . That being said, it appears that Plaintiffs' primary theory is that [RN's] are denied meal/rest periods because their Units will be out of compliance with staffing ratios if they take them ('Ratio Theory'). Secondly, Plaintiffs appear to contend that [RN's] working 12[-]hour shifts do not understand that they are entitled to three 10[-]minute breaks per shift and therefore are denied a third break every day they work ('Confusion Theory'), and that [RN's] do not put down all time worked on their timecards and do not record NB even when

they do not get meal/rest periods, because they have been intimidated into not doing so by their supervisors ('Coercion Theory')."⁹

C. *Plaintiffs' Reply Memorandum and Supporting Exhibits*

In their reply memorandum to the motion for class certification, Plaintiffs did not directly address Sharp's characterization of their allegations, but made several statements that seemed to confirm that they were proceeding under at least some of the theories identified by Sharp. Relevant to the Ratio Theory described by Sharp, Plaintiffs stated that one of the common issues of law and fact in the case was "whether [Sharp's] staffing policies permit members of the putative class to receive statutory meals and rest breaks." Relevant to the Confusion Theory, Plaintiffs stated that "perhaps *the* most fundamental, common issue of fact affecting all putative class members in this case" was "whether Sharp's policies are sufficiently clear that nurses can reasonably be expected to report and receive appropriate compensation for missed meal and rest breaks." Further, Plaintiffs argued that Sharp had "no coherent policy, procedure or practice for ensuring that nurses receive their meals and rest periods."

⁹ We will hereafter refer to these three theories as the "Ratio Theory," the "Confusion Theory" and the "Coercion Theory." Sharp also attempted to make sense of Plaintiffs' allegations with the following statement: "Although difficult to ascertain from Plaintiffs' [memorandum of points and authorities], it appears that certification is sought with respect to Plaintiffs' claims that (1) Sharp failed to provide [RN's] with meal/rest periods, or compensation in lieu thereof, in accordance with California law . . . ; and (2) Sharp failed to pay [RN's] wages for time worked during meal periods or pre- and post-shift work Accordingly, this opposition will focus on class certifications [*sic*] issues involving those claims."

However, Plaintiffs' reply memorandum also discussed other theories of liability not encompassed by Sharp's attempted characterization of the issues. First, Plaintiffs reiterated their allegation that "the meal waiver forms used by Sharp since at least April 2005 purport to waive the first meal period of employees assigned to twelve-hour shifts, when the language of Labor Code §§ 512 and 516 would appear to prohibit such an agreement."¹⁰ Second, Plaintiffs again mentioned their claim for lost overtime wages for educational, orientation or training activities. Specifically, responding to the statement in Sharp's opposition that the claim regarding the "EDUC" coded entries was "not raised in [Plaintiffs'] Complaint or during discovery," Plaintiffs stated that "the Complaint alleged that nurses were not being paid for all hours of work, so that Sharp was, or reasonably

¹⁰ Labor Code section 512 provides in relevant part: "(a) An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived. [¶] (b) Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees."

Labor Code section 516 provides: "Except as provided in Section 512, the Industrial Welfare Commission may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers."

should have been, on notice of Plaintiffs' 'EDUC' allegations."¹¹ Third, Plaintiffs' reply memorandum raised an issue that Plaintiffs did not raise in their opening memorandum or in their complaint. Based on evidence that Sharp submitted with its opposition, Plaintiffs argued in their reply memorandum that Sharp was not paying RN's one full hour of extra pay as required by Labor Code section 226.7, subdivision (b) when they missed a rest or meal period. It based this allegation solely on a spreadsheet prepared by a Sharp human resources executive, which showed the number of extra hours that Sharp had paid to RN's since 2003 for missed rest and meal periods. Sharp pointed out that, according to the spreadsheet, Sharp compensated RN's for 12,653.25 extra hours in 2004, 15,402.50 extra hours in 2006, 15,769.88 extra hours in 2007 and 6,737.50 extra hours in 2009 for missed

¹¹ Confirming that Plaintiffs intended to pursue a classwide claim based on the failure to pay overtime for certain "EDUC" coded work hours, Plaintiffs submitted a supplemental reply declaration from Plaintiffs' counsel attaching certain time cards and payroll records, which counsel's declaration purported to use to "illustrate one of Plaintiffs' EDUC allegations, which is that Sharp's systemwide Payroll Department systematically underpays putative class members for daily and weekly overtime and double time by paying hours coded as 'EDUC' at a rate that is lower than the employee's normal hourly rate." As we will explain in part III.D.1, *post*, although the trial court properly granted a motion to strike the supplemental declaration, the declaration nevertheless is useful to demonstrate that Plaintiffs intended the "EDUC" allegations as part of their classwide claims.

Further, after the briefing was completed in the trial court on the class certification motion, Plaintiffs submitted a letter to the trial court, at its request, discussing whether the case should be stayed in light of a case pending before our Supreme Court (i.e., *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25, review granted Oct. 22, 2008, S166350). In that letter, Plaintiffs reiterated their classwide claim against Sharp for "improperly calculating overtime and double-time rates for employees engaged in educational, training and related activities (coded as 'EDUC') by using a rate of pay *less than* the employees 'regular rate of pay' as that term of art is defined by applicable regulatory and decisional authority."

rest and meal periods. Plaintiffs argued that because those figures each contained *fractions of an hour*, Sharp improperly failed to compensate RN's with a *full* hour of extra pay.

Along with their reply memorandum, Plaintiffs filed a supplemental declaration signed by their attorney, which attached 37 exhibits including the full transcripts from recently taken depositions of 10 RN's (whose declarations Sharp submitted in support of its opposition) and over 600 pages of timecards and payroll reports from putative class members purporting to show "various categories of wage and hour violations."

D. *Sharp's Motion to Strike the Evidence Submitted in Support of Plaintiffs' Reply Memorandum*

Sharp filed a motion to strike the supplemental evidence that Plaintiffs submitted with their reply memorandum. Sharp argued (1) the declaration of Plaintiffs' counsel consisted largely of argument, not evidence, and was an impermissible attempt to circumvent the page limitation for reply memoranda; (2) the applicable rule of court (Cal. Rules of Court, rule 3.764(c)) did not expressly permit the filing of evidence with a reply brief in a class certification proceeding; and (3) even if not required by applicable rule of court, the trial court should exercise its discretion to strike the evidence because Plaintiffs had attempted to "sandbag" Sharp with the evidence. Sharp also submitted extensive evidentiary objections to the evidence submitted with Plaintiffs' reply brief.

In response, Plaintiffs, among other things, acknowledged that rule 5.5.3 of the San Diego County Superior Court Local Rules provides in relevant part: "The court may decline to consider any supplemental declarations which are not timely served or do not

appear to be the result of newly discovered evidence or facts which were not available when the original pleadings were filed, or where the supplemental pleadings were filed late to gain a tactical advantage." However, they argued that those circumstances did not exist here because "Plaintiffs' supplemental evidence was concerned solely with addressing factual assertions raised *for the first time* in Defendants' Opposition Papers, or with challenging the credibility of the witnesses making those assertions."

The trial court granted Sharp's motion to strike the supplemental declaration and evidence that Plaintiffs had submitted with their reply brief, with the exception of admitting only that evidence that "impeaches declarations filed by [Sharp] in support of the opposition to the motion."

E. *The Trial Court's Denial of Plaintiffs' Class Certification Motion*

In a minute order, the trial court denied Plaintiffs' class certification motion on the ground that Plaintiffs had not met their burden to establish that common questions of law and fact predominate and that the case was manageable on a class basis. After properly setting forth the applicable standards for class certification, the trial court discussed the central disputed issue of "whether predominant common questions of law and fact exist in this case." In doing so, it adopted the characterization of Plaintiffs' allegations set forth in Sharp's opposition memorandum, i.e., the Ratio Theory, the Confusion Theory and the Coercion Theory, concerning meal and rest periods.

"Plaintiffs contend that there are overriding common questions of law and fact despite policies to the contrary (i.e., Defendant's actual practice is to deny nurses meal and rest breaks). Plaintiffs base their argument on one overriding factor: thin staffing ratios make it impossible for conscientious nurses to take breaks without compromising their patients' care. Plaintiffs

also base their argument in support of class certification on two more specific but related contentions: nurses are coerced by management not to claim overtime breaks and are confused about how to claim missed breaks and meal periods."

The trial court then discussed why common issues of law and fact did not predominate with respect to each of the three theories.

With respect to the Ratio Theory, the trial court pointed out — with citations to evidence submitted by Sharp — that "Plaintiffs wish to certify a class of approximately 3,900 nurses with 50 different job titles, each with their own job descriptions at over 160 different units throughout Defendants' system, within 4 acute care hospitals, three specialty hospitals/facilities, two mental health clinics, three skilled nursing facilities, and home health, hospice, 'nurse connection' and 'SRN' services operated out of Defendants' administrative headquarters in Kearn[y] Mesa." The trial court noted that "the staffing ratios apply to less than half of the units," and observed that "even when staffing rules are involved, they are correctly calculated to exceed legal minimums."¹² The trial court concluded its discussion of the Ratio Theory by stating: "More importantly, and in

¹² With respect to the last point, the trial court stated: "Defendants use a system called Quadramed Win PFS ('Quadramed') to calculate the number of nursing hours needed to staff a unit covered by ratios. It factors in the time needed to cover breaks when calculating the number of needed patient care hours. It does not take into account the availability of persons without designated patient assignment who are also available to provide coverage for meal or rest breaks (e.g., managers, leads, resource nurses, nurse educators, charge nurses, etc.) or the times when a patient may be out of the unit for procedures or who have been discharged without it yet being entered into the system. . . . Furthermore Quadramed does not utilize a static, formulaic approach but instead basis [*sic*] staffing requirements on frequently updated information on the acuity of nursing needs of actual patients."

contrast to many if not most wage and hour cases where classes are certified, Defendants have taken great care that its policies are in compliance with current wage and hour legal requirements and pay premium time for nurses who are allowed and required to self report missed breaks and meal periods by putting NB on their time cards which they certify as true and correct."

In discussing both the Confusion Theory and the Coercion Theory the trial court made several observations:

"[T]hese arguments are based on generalized assumptions which are premised upon subjective analysis of each individual's state of mind. Furthermore, there is likely a lack of any substantial commonality since there are over 100 different managers with various hospitals/facilities. An analysis of the states of mind of nurses deposed has led this Court to conclude that Plaintiffs have not met their burden of presenting substantial evidence to support these theories. There is a complete lack of consensus covering a broad range of highly individualized responses with respect to meal and rest breaks. . . . Where coercion and confusion is claimed, the responses are highly subjective and would require individualized examination to reconcile the disparities on the time card, prepared while the information was fresh in each nurse['s] mind. Also, each nurse would have to explain his or her departure from legal requirements."

Specifically discussing the Coercion Theory, the trial court commented on the weakness of the evidence supporting Plaintiffs' allegation that RN's were coerced into not claiming missed rest or meal periods:

"With respect to the coercion theory, typically there is almost a total absence of any complaint of objective, overt management pressure to not use the NB designation. Many nurses freely used the NB designation whenever they felt appropriate. Those subjectively claiming pressure were less than convincing in explaining why. Some nurse claimed NB on their time cards despite their subjective belief that management did not foster a coercion free environment."

The trial court concluded by stating that the case would not be manageable as a class action.

"As to the issue of manageability, Plaintiffs have failed to meet their burden of presenting substantial evidence to establish how this can be managed on a class basis. (See *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1108 [(*Lockheed*)].) They have lumped together approximately 3900 nurses working for over 100 managers in 164 units. As noted above, their overriding theory of inadequate staffing base[d] on staff ratios has not been established and does not even apply to a majority of units."

Plaintiffs filed an appeal from the order denying class certification, challenging the trial court's decision as well as several evidentiary rulings. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (*Linder*) ["The denial of certification to an entire class is an appealable order"].)

II

DISCUSSION

A. *Standard of Review for Challenge to Order Denying Class Certification*

"[T]rial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action" and are accordingly "afforded great discretion in granting or denying certification." (*Linder, supra*, 23 Cal.4th at p. 435.) We thus apply an abuse of discretion standard of review to an order denying class certification. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).) "A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions." (*Fireside, supra*, 40 Cal.4th at p. 1089.) "Under this standard, an order based upon improper

criteria or incorrect assumptions calls for reversal "'even though there may be substantial evidence to support the court's order.'" [Citations.] Accordingly, we must examine the trial court's reasons for denying class certification. 'Any valid pertinent reason stated will be sufficient to uphold the order.'" (*Linder*, at p. 436.)

B. *Requirements for Class Certification*

"Section 382 of the Code of Civil Procedure authorizes class suits in California when 'the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court.'" (*Linder*, *supra*, 23 Cal.4th at p. 435.) "Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods." (*Fireside*, *supra*, 40 Cal.4th at p. 1089.) "The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members." (*Sav-On*, *supra*, 34 Cal.4th at p. 326.) "The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Ibid.*)

Here, the trial court denied class certification on the ground that Plaintiffs failed to establish that common questions of law or fact predominate. The requirement that common questions of law and fact predominate "'means "each member must not be required to individually litigate numerous and substantial questions to determine his [or

her] right to recover following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants.'"" (*Lockheed, supra*, 29 Cal.4th at p. 1108.)

The trial court also discussed the concept of manageability, which arises under the issue of whether a class action is superior to individual lawsuits. "[E]ven if questions of law or fact predominate, the lack of superiority provides an alternative ground to deny class certification. [¶] . . . [¶] In deciding whether a class action would be superior to individual lawsuits, 'the court will usually consider [four factors]: [¶] [(1)] The interest of each member in controlling his or her own case personally; [¶] [(2)] *The difficulties, if any, that are likely to be encountered in managing a class action*; [¶] [(3)] The nature and extent of any litigation by individual class members already in progress involving the same controversy; [and] [¶] [(4)] The desirability of consolidating all claims in a single action before a single court.'" (*Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 120-121, italics added.) As our Supreme Court has commented, the proponent's burden of establishing the propriety of class certification "clearly contemplates a demonstration of predominance *and manageability*." (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 922, italics added.)

C. *The Trial Court Failed to Consider All of the Theories of Liability Alleged by Plaintiffs*

In their opening appellate brief, Plaintiffs contend that the trial court abused its discretion by failing to consider several of the theories of liability described in their class

certification motion which allegedly raise questions of law and fact common to the class. Plaintiffs identify two theories that the trial court purportedly did not consider: (1) the claim that Sharp acted unlawfully in requiring that RN's working over eight hours agree to sign forms waiving either their first or second meal period; (2) the claim that RN's were not receiving appropriate overtime pay for educational, training and orientation activities designated by the code "EDUC."

The central inquiry in a class certification motion is "whether *the theory of recovery advanced by the proponents of certification* is, as an analytical matter, likely to prove amenable to class treatment." (*Sav-On, supra*, 34 Cal.4th at p. 327, italics added.) "In examining whether common issues of law or fact predominate, the court must consider *the plaintiff's legal theory of liability*." (*Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450 (*Walsh*).) In determining the legal theory of liability under which a plaintiff is proceeding, "[r]eviewing courts consistently look to the allegations of the complaint and the declarations of attorneys representing the plaintiff class" (*Sav-On*, at p. 327.)

Here, as we have described, Plaintiffs' legal theory of liability, as alleged in the complaint and detailed more fully in their class certification motion and accompanying declarations, although not always clearly set forth, unquestionably encompassed a theory of liability based on allegedly illegal meal waiver forms and the nonpayment of overtime

for hours devoted to educational, training or orientation activities coded as "EDUC."¹³

The trial court made no mention whatsoever of these theories of liability in its ruling on the class certification motion, and its reasons for finding class treatment inappropriate as to the Ratio Theory, the Confusion Theory and the Coercion Theory, do not, on their

¹³ In their appellate reply brief, Plaintiffs attempt to include two additional items within the scope of the issues that the trial court purportedly did not consider in ruling on the class certification motion. We may decline to consider an argument raised for the first time in a reply brief. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) Moreover, even were we to consider the tardy arguments, we would conclude, for the following reasons, that the trial court did not abuse its discretion by failing to address the two additional issues, which we discuss in turn.

The first issue that Plaintiffs fault the trial court for not addressing is the allegation that Sharp failed to pay class members a full hour of extra pay for missed meal and rest periods. However, as we have discussed, this issue was raised for the first time in Plaintiffs' reply memorandum in the trial court, based solely on a single piece of evidence that Sharp submitted with its opposition memorandum. Because the issue was raised for the first time in Plaintiffs' reply memorandum and Sharp did not have an opportunity to address it in the trial court, the trial court did not abuse its discretion in not addressing the issue in its class certification ruling. (Cf. *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316 (*San Diego Watercrafts*) [because of opposing parties' due process rights, the trial court should have declined to consider materials submitted for the first time in reply to a summary judgment motion].)

The second issue that Plaintiffs contend is missing from the trial court's minute order is the allegation that Sharp violated the unfair competition law (Bus. & Prof. Code, § 17200 et seq.). However, Plaintiffs' complaint makes clear that the unfair competition claim is solely *derivative* of the allegation that Sharp committed wage and hour violations. As the complaint alleged, "the conduct and practices of Defendants . . . in violating state wage and hour laws and regulations, as alleged above, constitute unlawful, unfair, or fraudulent business practices." Plaintiffs made no different allegation during the briefing of their class certification motion. Therefore, the trial court's rejection of class treatment for the wage and hour claims was an implied rejection of class treatment for the derivative unfair competition claim as well. The trial court accordingly was within its discretion to omit a separate discussion of the unfair competition claim in its class certification ruling.

face, appear to apply to the theories of liability based on the meal waiver forms or the nonpayment of overtime for activities coded as "EDUC."¹⁴

The issue before us, therefore, is whether the trial court abused its discretion in failing to consider two of the theories of liability identified by Plaintiffs as making up part of their class claims against Sharp. "[I]t is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered." (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598.) ""The term [judicial discretion] implies the absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. [Par.] To exercise the power of judicial discretion *all the material facts in evidence must be known and considered, together also with the legal principles essential to an informed, intelligent and just decision.*" [Fn. omitted.]" (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448, italics added, quoting *In re Cortez* (1971) 6 Cal.3d 78, 85-86.) The critical issues before the trial court were whether common questions of law and fact *predominated*, and whether class treatment was a *superior* means of proceeding as to the case as a whole. Without fully considering *all* of the theories of legal liability that made up Plaintiffs' case, the trial

¹⁴ We understand that the confusing nature of Plaintiffs' briefing of the class certification motion may well have contributed to the trial court's failure to address two of Plaintiffs' theories of recovery. However, with this fact in mind, we have closely reviewed the record and have determined that the two theories are sufficiently set forth in Plaintiffs' briefing of the motion, so that it was error for the trial court to have neglected to consider them.

court was not able to rationally decide the predominance and superiority issues. This is particularly the case with respect to the predominance inquiry because a ruling on that issue involves ""pragmatically assess[ing] the *entire* action and the *issues* involved."" (Ali v. U.S.A. Cab Ltd. (2009) 176 Cal.App.4th 1333, 1351, italics added.) The trial court is not able to assess the entire action and issues involved without considering all of the relevant theories of liability.¹⁵ We therefore conclude that the trial court abused its discretion because it demonstrably failed to consider all of the theories of liability advanced by Plaintiffs.¹⁶

We will therefore reverse the ruling on the class certification motion and remand for the trial court to reconsider the motion, taking into account Plaintiffs' additional theories of liability, as expressed in their class certification motion, premised on (1) the meal waiver forms, and (2) the failure to pay overtime for activities coded as "EDUC."

¹⁵ Sharp contends that *Walsh, supra*, 148 Cal.App.4th 1450, is "directly applicable here" because it affirmed an order denying class certification on the ground of lack of commonality even though "the trial court did not explain at length why it concluded there was a lack of commonality." (*Id.* at p. 1452.) We do not find *Walsh* to be applicable, as *Walsh* did not concern a trial court's failure to consider all of the theories of liability that the plaintiffs were pursuing in their proposed class action.

¹⁶ Although a trial court is not required to provide a formal statement of decision (including findings of fact and conclusions of law) in support of a ruling on class certification (*Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 651; *Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, 417-418), the lack of a formal statement is not the issue here. Although the trial court was not required to explain its ruling at length, it chose to do so, and in so doing it demonstrated an abuse of discretion. Specifically, as we discuss, the trial court's minute order demonstrated that it failed to consider two of the theories of liability that Plaintiffs had identified in their class certification motion.

We express no opinion on the proper outcome of the class certification motion on remand.¹⁷

D. *Evidentiary Rulings*

Plaintiffs challenge several of the trial court's rulings excluding the evidence that they submitted in support of their class certification motion. Because the evidentiary issues will be relevant on remand, we proceed to consider Plaintiffs' arguments.

We apply an abuse of discretion standard when reviewing the trial court's evidentiary rulings. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

1. *Ruling Striking the Evidence Submitted in Support of Plaintiffs' Reply Memorandum*

We have noted that along with their reply memorandum, Plaintiffs submitted a declaration signed by their attorney and voluminous additional evidence, including transcripts of recently taken depositions, time cards and payroll reports. The trial court granted Sharp's motion to strike, except "to the extent that this evidence impeaches declarations filed by Defendants in support of opposition to the motion." At the hearing on the class certification motion, the trial court explained that "[f]rom a due process standpoint, you can't submit new evidence in your reply."

As we have explained, Plaintiffs acknowledged in the trial court that rule 5.5.3 of the San Diego County Superior Court Local Rules provides that "[t]he court may decline to consider any supplemental declarations which are not timely served or do not appear to

¹⁷ Further because we are reversing and remanding for further proceedings, we need not and do not decide whether, as Plaintiffs contend, the trial court erred in purportedly considering the merits of the wage and hour claims.

be the result of newly discovered evidence or facts which were not available when the original pleadings were filed, or where the supplemental pleadings were filed late to gain a tactical advantage." This rule is consistent with case law developed in the context of summary judgment motions that "the inclusion of additional evidentiary matter with the reply should only be allowed in the exceptional case" (*Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362, fn. 8) and that "[w]hether to consider evidence not referenced in the moving party's separate statement rests with the sound discretion of the trial court . . ." (*San Diego Watercrafts, supra*, 102 Cal.App.4th at p. 316). Further, because of due process concerns, the trial court may properly exercise its discretion to consider evidence submitted with the reply to a summary judgment motion only when the opposing party has received "notice and an opportunity to respond to the new material" (*Plenger*, at p. 362, fn. 8) and is "fully advised of the issues to be addressed and . . . given adequate notice of what facts it must rebut in order to prevail" (*San Diego Watercrafts*, at p. 316). The same approach has been applied in the context of other types of motions. (*Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308 [in a preliminary injunction proceeding, "the trial court had discretion whether to accept new evidence with the reply papers"].) An identical rule should logically apply in a motion for class certification, especially when, as here, Plaintiffs adopted the same conventions for presenting evidence as in a separate statement in support of a summary judgment motion.

Applying the approach set forth in case law and the superior court's local rules, we conclude that the trial court was well within its discretion to strike some of the

supplemental evidence submitted with Plaintiffs' reply memorandum.¹⁸ Sharp did not have notice and an opportunity to respond to the new evidence and, as Sharp correctly observed, some of the evidence could have been submitted along with Plaintiffs' opening memorandum — particularly the voluminous time cards and payroll records that Plaintiffs claimed to show "various categories of wage and hour violations." With respect to the deposition transcripts of Sharp's declarants, Plaintiffs had a sound basis for not earlier submitting that evidence, and the trial court thus reasonably (and consistently with the superior court local rule) allowed those declarations into evidence to the extent they impeached Sharp's declarations.

2. *Rulings Excluding Evidence Submitted by Plaintiffs' Expert Witnesses*

We next consider Plaintiffs' challenge to the trial court's exclusion of paragraphs 32, 35, 37, 38, 41, 46 through 56, 64, 70 and 77 of Lewin's report; and paragraphs 4, 8, 9c and 9d of Drogin's declaration.

¹⁸ Plaintiffs contend that in reviewing the trial court's decision to strike the evidence, we must follow the standard of review for orders on motions for class certification which "'presents an exception to the general rule on review that we look only to the trial court's result, not its rationale'" (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 655) so that a reviewing court "consider[s] only the reasons cited by the trial court for the denial, and ignore[s] other reasons that might support denial." (*Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1205.) However, that standard has no application here because we are considering an evidentiary ruling, not a ruling on class certification. In reviewing an evidentiary ruling, the exclusion of evidence will be affirmed if proper on any ground. (*Philip Chang & Sons Associates v. La Casa Novato* (1986) 177 Cal.App.3d 159, 173 (*Philip Chang*).)

a. *The Lewin Report*

The trial court sustained objections to paragraphs 32, 35, 41, 46 through 56, 64, 70 and 77 of Lewin's report on the ground of "improper opinion," which was one of the grounds argued by Sharp for exclusion of those paragraphs. A review of Sharp's objections show that under the rubric "improper opinion," Sharp included (1) opinions for which Lewin "laid no foundation to offer an opinion" and (2) testimony that "improperly invades the province of the fact finder . . . and as such is argumentative." As we will explain, we have reviewed each of the paragraphs at issue and have determined that the trial court was within its discretion to sustain an objection of the grounds supplied under the rubric of "improper opinion." Paragraphs 32, 35, 41, 64, 70 and 77 all make inferences about the efficacy of Sharp's meal and rest period policies and practices or the behavior of RN's under those policies and practices, but Lewin did not establish that he has the proper expertise or foundational information to offer an opinion, and making such inferences is more properly within the role of a trier of fact.

Paragraphs 46 through 56 set forth Lewin's understanding of the applicable regulations on staffing ratios, discuss the computer program that Sharp uses to control staffing ratios, and opine on how the actual staffing ratios in a particular unit at Sharp compares to target staffing ratios. For all of these paragraphs, Sharp's objection on the ground of "improper opinion" focused on the fact that, as demonstrated in Lewin's deposition, (1) he was not familiar with law in the area of staffing ratios or with the computer program used by Sharp to control staffing ratios, and (2) was not an expert on nurse-to-patient staffing ratios. We conclude that based on these considerations, the trial

court was within its discretion to rule that Lewin's expert testimony on the subjects addressed in paragraphs 46 through 56 should be excluded as improper opinion.

The trial court sustained objections to paragraphs 37 and 38 of Lewin's report on the ground of "lack of foundation." These rulings were a proper exercise of discretion. Paragraph 37 stated, without factual foundation, that Sharp had a "systemic practice of limiting the recording of meal periods to one per day" and made an unwarranted inference that Sharp's policies "strongly discourage[d]" or "effectively prohibit[ed]" from recording a second meal period. Paragraph 38 purported to set forth the number of times that RN's in a particular unit and the named Plaintiffs claimed a second meal period. However, as Sharp pointed out in its objections, Lewin admitted in his deposition that he did not review the relevant timecards or perform the relevant calculations.

b. *Drogin's Declaration*

The trial court sustained objections to paragraphs 4, 8, 9c and 9d of Drogin's declaration on the ground of "improper opinion testimony." Paragraph 4 opined that random sampling methods would be appropriate for estimating the percentage of rest and meal breaks in which employees were not totally relieved of their duties and the consequent "classwide damage amount." Paragraph 8 discussed the sources of information to be drawn upon to obtain data on missed meal and rest breaks. Paragraph 9c discussed the type of information that should be available prior to a deposition to ensure accurate statistical computations. Paragraph 9d described the type of information the trial court would use to decide liability and stated that findings for a sampling of class members "can be reliably projected to the class as a whole."

Sharp's objection on the ground of "improper opinion testimony" specified that "Drogin has laid no foundation to offer an opinion that random sampling of the proposed class would provide an appropriate statistical sample to provide common proof that could be applied across the class." Sharp further pointed to the statement in Drogin's declaration that the only information he reviewed specific to this case was the "the Complaint, Defendant's Answer to the Complaint, and datafiles giving a list of putative class members."

We conclude that the trial court was well within its discretion to conclude that Drogin's review of Plaintiffs' complaint, Sharp's answer and a list of putative class members was insufficient as a foundation for an expert opinion on the efficacy of a statistical sampling in this case or the details of how it should be carried out. Accordingly, the trial court's evidentiary ruling on Drogin's declaration was not in error.

3. *Rulings Excluding Certain Portions of the Declarations Submitted by the Named Plaintiffs*

In support of their class certification motion, Plaintiffs submitted declarations from four of the named Plaintiffs —Hurley, Donley, Bowers and Klepin. The trial court sustained some of Sharp's objections to certain portions of the declarations. Plaintiffs challenge some of those evidentiary rulings, contending that the trial court erred with respect to all of the objections sustained on the ground of (1) improper opinion; (2) lack of personal knowledge or foundation; and (3) relevance. We will separately discuss the three categories of rulings.

We will affirm the trial court's exclusion of evidence if proper on any ground, regardless of whether it is a ground that the trial court gave for its ruling or one that was identified in Sharp's objections. (*Philip Chang, supra*, 177 Cal.App.3d at p. 173 ["If evidence is excluded on an improper objection but the evidence excluded is subject to objection on a different ground, it does not matter that the reason advanced by counsel or relied upon by the court was wrong. [Citations.] If the exclusion is proper upon any theory of law applicable to the instant case, the exclusion must be sustained regardless of the particular considerations which may have motivated the trial court to its decision."]; *People v. Geier* (2007) 41 Cal.4th 555, 582 [affirming evidentiary ruling because it was correct under Evid. Code, § 352, even though the trial court did not cite that provision].)

a. *Objections Sustained on the Ground of Improper Opinion*

On the ground of improper opinion, the trial court sustained objections to either all, or a portion of, paragraphs 8, 11, 12, 5 through 7, 10, 14, 15, 20, 38, 40 through 42, and 44 of the Hurley declaration; paragraphs 6, 7 and 17 of the Bowers declaration; paragraphs 6 and 27 of the Donley declaration; and paragraphs 7, 9, 15, 17 through 20, 23, 25 through 29, 34, 37, 38, 40 and 41 of the Klepin declaration.

i. *Rulings applicable to entire paragraphs where objection was only to partial paragraphs*

Plaintiffs contend that with respect to several of the paragraphs at issue, Sharp did not object to the entire text of the paragraphs on the ground of improper opinion, but the trial court nevertheless excluded the entire paragraph on that basis. Plaintiffs are correct with respect to paragraph 9 of the Klepin declaration and paragraph 20 of the Hurley

declaration. However, the trial court did not abuse its discretion because the remainder of paragraph 9 of the Klepin declaration is inadmissible on grounds of relevancy, and of lack of foundation and personal knowledge; and the remainder of paragraph 20 of the Hurley declaration is inadmissible on the ground of lack of foundation and personal knowledge. (Evid. Code, §§ 350, 702, 1200.)

ii. *Rulings for which Sharp did not make an objection on the ground of improper opinion*

Plaintiffs point out that the trial court sustained objections to certain paragraphs on the ground of improper opinion, although Sharp did not even object on that ground.

Plaintiffs are correct with respect to paragraphs 18, 19, 28 and 41 of the Klepin declaration. However, the trial court did not abuse its discretion in sustaining objections to those paragraphs because paragraph 18 was inadmissible based on lack of foundation and personal knowledge; paragraphs 19, 28 and 41 were inadmissible based on hearsay, and lack of foundation and personal knowledge. (Evid. Code, §§ 702, 1200.)

iii. *Rulings in which the ground of improper opinion testimony did not properly apply to the entire paragraph*

Plaintiffs contend that some of the paragraphs excluded in their entirety based on improper opinion testimony consisted in part of "first[]hand observations of fact" which should have been admitted. We agree that the last sentence of paragraph 19 of the Klepin declaration, the first and last sentences of paragraph 34 of the Klepin declaration, the last sentences of paragraphs 42 and 44 of the Hurley declaration, and the first sentence of paragraph 27 of the Donley declaration were all based on firsthand observations of fact. However, the trial court did not abuse its discretion by excluding paragraph 19 of the

Klepin declaration, the first and last sentences of paragraph 34 of the Klepin declaration, or the last sentence of paragraph 42 of the Hurley declaration because those statements were inadmissible hearsay. (Evid. Code, § 1200.) Therefore, the trial court abused its discretion only with respect to last sentence of paragraph 44 of the Hurley declaration and the first sentence of paragraph 27 of the Donley declaration.

iv. *Rulings excluding only portions of paragraphs*

Plaintiffs argue the trial court erred with respect to its rulings excluding *portions* of paragraphs on the ground of improper opinion. Plaintiffs argue that "the majority of the excluded material clearly consists of *factual observations*, and not opinion" and contained the declarants "personal observations regarding their units' staffing and meal and rest period practices." We conclude that Plaintiffs' position has merit only with respect to the fourth sentence of paragraph 37 of the Klepin declaration. That statement is based on personal observation, and no other ground for exclusion applies.

b. *Objections Sustained on the Ground of Lack of Foundation or Personal Knowledge*

On the ground of lack of foundation or personal knowledge, the trial court sustained objections to all, or a portion of, paragraphs 13, 23, 26, 34, 36, 45, 48 and 51 of the Hurley declaration; paragraphs 11, 15 and 16 of the Bowers declaration; and paragraphs 10, 15, 21, 24, 28, 31, 22, 25, 26, 29 and 30 of the Donley declaration.

Plaintiffs argue that "[n]early all of the material excluded" on the ground of lack of foundation or personal knowledge "consist almost entirely of the witnesses' personal observations," and thus the trial court abused its discretion in excluding the evidence.

We agree with Plaintiffs that the last two sentences of paragraph 23 of the Hurley declaration, the first and last sentences of paragraph 45 of the Hurley declaration, and the first and second sentences of paragraph 29 of the Donley declaration should not have been excluded based on lack of foundation or personal knowledge. However, the first and second sentences of paragraph 29 of the Donley declaration are inadmissible hearsay. (Evid. Code, § 1200.) Therefore, the trial court abused its discretion only with respect to the first and last sentences of paragraph 45 of the Hurley declaration.

c. Objections Sustained on the Ground of Relevance

On the ground of relevance, the trial court sustained objections to all, or a portion of, paragraph 17 of the Hurley declaration; paragraph 19 of the Bowers declaration; and paragraphs 9, 18, 23, 32 and 33 of the Donley declaration.

Plaintiffs contend that the trial court excluded "several passages of obviously relevant material" which they identify. Plaintiffs convincingly argue for the relevance of paragraphs 23, 32 and 33 of the Donley declaration. However, paragraphs 23 and 32 are inadmissible because of lack of foundation and personal knowledge, and the first sentence of paragraph 33 is inadmissible hearsay. (Evid. Code, §§ 702, 1200.) Therefore, the trial court's only abuse of discretion with respect to its relevancy rulings was the exclusion of the second and third sentences of paragraph 33 of the Donley declaration.

DISPOSITION

The order denying class certification is reversed, and this action is remanded to the trial court with instructions to reconsider, in light of our opinion, the motion for class certification filed by Plaintiffs. The parties are to bear their own costs on appeal.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.